

Public Chapter 439

HOUSE BILL NO. 433

By Representative Fowlkes

Substituted for: Senate Bill No. 432

By Senator Fowler

AN ACT to amend Tennessee Code Annotated, Title 35, relative to Trustees.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 35, Chapter 50, is amended by adding the following new section:

Section _____. Limited Power of Trustee - Beneficiary.

(a) Due to the potential conflict of interest that exists between a Trustee who is a beneficiary and other beneficiaries of the trust, unless the terms of a trust refer specifically to this subsection and provide expressly to the contrary, any power conferred upon a Trustee (other than the settlor of a revocable or amendable trust or a decedent's or settlor's spouse who is the Trustee of a testamentary or an inter vivos trust for which a marital deduction has been allowed):

(1) to make discretionary distributions of either principal or income to or for the benefit of such Trustee, except to provide for that Trustee's health, education, maintenance, or support as described under Internal Revenue Code §§ 2041 and 2514;

(2) to make discretionary allocations of receipts or expenses as between principal and income, unless such Trustee acts in a fiduciary capacity whereby such Trustee has no power to enlarge or shift any beneficial interest except as an incidental consequence of the discharge of such Trustee's fiduciary duties;

(3) to make discretionary distributions of either principal or income to satisfy any legal support obligations of such Trustee; or

(4) to exercise any other power, including the right to remove or to replace any Trustee, so as to cause the powers enumerated in subdivisions (1), (2) or (3) to be exercised on behalf of, or for the benefit of, a beneficiary who is also a Trustee, cannot be exercised by such Trustee. Any of the foregoing proscribed powers that are conferred upon two (2) or more Trustees may be exercised by the Trustees who are not so disqualified. If there is no Trustee qualified to exercise such power, any party in interest, as defined in subsection (c), may

apply to a court of competent jurisdiction to appoint an independent Trustee and such power may be exercised by the independent Trustee appointed by the court.

(b) This section applies to:

(1) Any trust executed after December 31, 1997, unless the terms of the trust refer specifically to this subsection and provide expressly to the contrary;

(2) Any testamentary trust created under a will executed after December 31, 1997, unless the terms of the trust refer specifically to this subsection and provide expressly to the contrary; and

(3) Any trust created under a document executed before December 31, 1997, unless:

(A) if the trust is revocable or amendable, the party in interest, as defined in subdivisions (c)(1) and (c)(2) of Section 1 of this act, revokes or amends the trust at any time to provide otherwise; or

(B) If the trust is irrevocable, all parties in interest, as defined in subsection (c), elect affirmatively, in the manner prescribed in subsection (d), not to be subject to the application of this subsection. Such election must be made on or before the later of December 31, 2000, or three (3) years after the date on which the trust becomes irrevocable.

However, the provisions of this subsection neither create a new cause of action nor impair any existing cause of action which, in either case, relates to any power proscribed by subsection (a) that was exercised before December 31, 1997.

(c) For the purpose of subsection (a) or (b):

(1) If the trust is revocable or amendable and the settlor is not incapacitated, the party in interest is the settlor.

(2) If the trust is revocable or amendable and the settlor is incapacitated, the party in interest is the settlor's legal representative under applicable law or the settlor's donee under the durable power of attorney that is sufficient to grant such authority.

(3) If the trust is not revocable or amendable, the parties in interest are:

(A) Each Trustee then serving;

(B) Each income beneficiary then in existence or, if any such beneficiary has not attained majority or is otherwise incapacitated, the beneficiary's natural guardian or other legal representative under applicable

law or the beneficiary's donee under a durable power of attorney that is sufficient to grant such authority; and

(C) Each remainder beneficiary then in existence or, if any such remainder beneficiary has not attained majority or is otherwise incapacitated, the beneficiary's natural guardian or other legal representative under applicable law or the beneficiary's donee under a durable power of attorney that is sufficient to grant such authority.

(d) The affirmative election required under subsection (b) must be made:

(1) If the settlor is not incapacitated and the trust is revocable or amendable, through a revocation of or an amendment to the trust;

(2) If the settlor is incapacitated and the trust is revocable or amendable, through a written declaration executed in the manner prescribed for the recordation of deeds in this State and delivered to the Trustee; or

(3) If the trust is not revocable or amendable, through a written declaration executed in the manner prescribed for the recordation of deeds in this State and delivered to the Trustee.

(e) A person who has the right to remove or replace a Trustee does not possess nor may that person be deemed to possess, by virtue of having that right, the powers of the Trustee that is subject to removal or to replacement.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.